UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

UNITED PARCEL SERVICE, INC.

and Case 17-CA-24201

PATRICK O'BRIEN, AN INDIVIDUAL

Charles T. Hoskin, Esq. for the General Counsel.

Joshua Flynt, Esq. (Akin, Gump, Strauss, Hauer & Feld, LLP) of Dallas TX for the Respondent

Patrick O'Brien, Pro Se.

DECISION

Statement of the Case

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Oklahoma City, Oklahoma, on November 21, 2008. The charge was filed June 19, 2008 and the complaint was issued August 29, 2008. The complaint, as amended, alleges United Parcel Service, Inc., (Respondent) violated Section 8(a) (1) and (5) of the Act by refusing to furnish information requested by Teamsters Local No. 886 (Union) necessary and relevant to the Union's function as exclusive collective-bargaining representative of bargaining unit employees. Respondent timely denied any wrongdoing. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following.

Findings of Fact

I. Jurisdiction

Respondent, an Ohio corporation, with an office and place of business located at 901 S. Portland, Oklahoma City, Oklahoma has been engaged in the interstate shipment of freight. During the past 12 months, Respondent in conducting its business operations derived gross revenues in excess of $50,000 for the transportation of freight from the State of Oklahoma directly to points outside the State of Oklahoma. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Facts

Respondent operates a shipping facility in Oklahoma City, Oklahoma known as the Metro facility. Patrick O'Brien (O'Brien) has worked at Respondent's Metro facility as a driver

for the past 17 years and is a shop steward for the Union. Matthew Hoffman (Hoffman) is Respondent's Red River District Labor Relations Manager. The Red River District includes Oklahoma City. Eric Baker (Baker) is Respondent's Manager at the Metro facility and Steve Stulce (Stulce) is O'Brien's supervisor. For the past 20 years Teamsters Union Local 886 has been the exclusive collective bargaining representative of Respondent's employees in the following appropriate bargaining unit (the unit):

> All full-time and regular part-time feeder drivers, package drivers, sorters, loaders, unloaders, porters, office clerical, clerks, mechanics, maintenance personnel (building maintenance), car washers, United Parcel Service employees in the employers' air operation, and to the extent allowed by law, employees in the export and import operations performing load and unload duties, and other employees of the employer for whom a signatory Local Union is or may become the bargaining representative.

Respondent and the Union have been parties to a series of collective bargaining agreements; the latest of which is effective from December 31, 2007 to July 31, 2013.[1] Patrick O'Brien is a shop steward for the Union at Respondent's Metro facility. Employees in the bargaining unit sort, load, pick up and deliver packages to customers. There are about 50 drivers in the bargaining unit.

By letter on May 30, 2008,[2] the Union through O'Brien requested that Respondent provide it with a copy of the Daily Package Recap Report (Report)[3] for the Metro facility on a daily basis. The Report is a spreadsheet which is generated on a daily basis and lists employees who worked the previous day, together with information concerning the number of hours they worked, if they had a helper, if they were late, if they had called in sick, if the driver performed loading and sorting duties, the number of deliveries and pickups of parcels made, how many parcels were delivered and picked up, how much time the driver was on the road, whether the driver met the time standards expected of them for making their deliveries and pickups on their route that day and, the number of stops per hour on the road. Most of the information contained in the Report is generated via a DIAD, an electronic wireless device used by drivers to send and receive text based information. Respondent is able to communicate with drivers through the DIAD on a 3x5 inch screen that can display four to five lines of text.

Copies of the Report are placed on a table every morning in the office of the Metro facility for Respondent's drivers to review. The Report usually ends up in the trash can at the end of the day in one of the Metro facility offices. While Hoffman testified that the Reports are maintained for 30 days, O'Brien was unaware such archives were maintained and when Bateman tried to arrange an accommodation Stulce told her that he would not keep anything for her. Regardless of whether the Reports were maintained for employee review there is no dispute that Respondent refused to furnish copies of the Report to O'Brien. The Union has received copies of the Report from Respondent in conjunction with pending grievances without any restrictions on its use. The Report has been used in the past by the Union in grievance disputes involving issues including pay and supervisors performing bargaining unit work. Two pending grievances involve issues of work load and attendance for which the Reports may be relevant. [4]

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[1] JT. Exh. 9.
[2] JT. Exh. 4.
[3] JT. Exh. 8.
[4] GC Exhs. 2 and 3.

According to Respondent's District Labor Relations Manager Hoffman, if one of Respondent's competitors like FedEx obtained a copy of the Report, it would put Respondent at a competitive disadvantage by showing the competitor how Respondent operates its business.

On about May 31, 2008, Carrie Ann Bateman (Bateman), a driver in the bargaining unit and a Union shop steward asked supervisor Stulce if she was going to be given a copy of the Report requested by O'Brien. Stulce said that he had to check with Hoffman. The following day Stulce told Bateman that Respondent would not provide the Union with a copy of the Report. When O'Brien returned from vacation, Bateman told him of Respondent's refusal to furnish the Report.

On July 9. 2008, O'Brien again asked Stulce for copies of the Report and Stulce told O'Brien that Respondent could not give him the Report. O Brien testified without contradiction that the Report could be used to monitor whether Respondent was violating the collective bargaining agreement[5] by working unit employees over 9.5 hours for any three days in a workweek. One remedy for a violation of this provision of the contract was an award of triple time pay. This was a new provision in the contract since December 2007 and was the subject of an ongoing dispute between the parties. From January through May 2008 O'Brien testified that unit employees had complained that they were being worked in excess of 9.5 hours per shift. The Report would reflect if a driver had worked in excess of 9.5 hours in a shift.

In addition the Report reflected pay codes for bargaining unit employees and according to O'Brien was the most accurate source of information to determine if employees were being properly paid. The grievance reflected in General Counsel's Exhibit 2 is an example of a pay grievance where the Report would be relevant.

Bateman testified that the Report would be relevant to her own grievance[6] that deals with whether Respondent violated the collective bargaining agreement by assigning her work inconsistent with her age and physical ability. Bateman contends that the Report shows how many stops she had to make and that would show she was unfairly assigned work.

On July 23, O'Brien filed a grievance over Respondent's refusal to provide the Report.[7] On about August 21, 2008 the Southern Region Area Parcel Grievance Committee, a joint panel created by the parties' collective bargaining agreement denied O'Brien's grievance.[8] Article 4 of the CBA[9] provides in part:

> If a supplement has no provision allowing a Local Union to request documents/information with regard to pending grievances, the following shall be incorporated into the Supplement: "The Employer shall, upon request, provide the Local Union or the steward designated by the Local Union, with documents/information that is reasonably related (based on NLRA standards) to the pending grievance."

[5] JT. Exh. 9, at 121-122.
[6] GC Exh. 3.
[7] JT. Exh. 5.
[8] JT. Exh. 7, at 22, case 2008-08-227.
[9] JT. Exh. 9, at 14.

B. The Analysis

Complaint paragraphs 6 and 7 allege that Respondent violated section 8(a)(5) of the Act by failing and refusing to furnish the Union with copies of the Report which, are necessary and relevant to the Union's performance of its duties as the exclusive collective bargaining representative of the above described unit.

Counsel for the General Counsel contends that the Report is necessary and relevant to the Union's function as exclusive bargaining representative. Respondent argues that it has no obligation to furnish the Reports because the Union did not specify the reasons it required the Reports, the Reports are available to the Union, the Joint Board ruled the Union is not entitled to the Reports absent a pending grievance and because providing the Reports would compromise the confidentiality of the Reports.

It is axiomatic that a union is entitled to information that is necessary and relevant to its duties as exclusive collective bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The employer's duty to furnish necessary and relevant information extends to grievance initiation or processing. *U.S. Postal Service*, 337 NLRB 820 (2002).

A request for information concerning wages, hours and other terms and conditions of employment of bargaining unit employees is presumptively relevant and must be supplied in a timely manner. *Fleming Companies*, 332 NLRB 1086 (2000). In seeking such information the union is not required to establish the precise relevance of the information unless the employer can rebut the presumption that the information is relevant. *Mathews Ready Mix*, 324 NLRB 1005, 1007 (1997) enfd 165 F.3d 74 (DC Cir. 1999). Relevance is determined by a broad discovery type standard. *Pennsylvania Power Co.*, 301 NLRB 1104 (1991.

In the instant case the information requested by the Union was presumptively relevant. The Reports dealt with issues concerning wages and hours as well as information that could lead to discipline. I find that Respondent has failed to show that the information is not relevant to the Union's duty of representing employees in the bargaining unit, accordingly the Union was under no obligation to establish the relevance or reasons it needed the Reports. Respondent's reliance on *Sara Lee Bakery Group, Inc., v. NLRB*, 514 F.3d 422 (5th Cir. 2008), *Crowley Marine Services, Inc.*, 329 NLRB1054, 1059-1060 (1999), and *Calmat Co.*, 283 NLRB 1103, 1106 (1987) for the proposition that a union must articulate a purpose for the information it seeks is inapposite since the information requested in those cases dealt with non bargaining unit information and thus was not presumptively relevant. Moreover, *Sara Lee Bakery*, to the extent that it stands for the proposition that a union must articulate a need for presumptively relevant information requested flies in the face of well-established Board precedent cited above that has not been reversed by the Supreme Court. Therefore I am under an obligation to follow Board precedent. *Los Angeles New Hospital*, 244 NLRB 960, 962, fn. 4 (1979).

Respondent also contends that the Union had access to the Reports and thus was under no obligation to furnish them to the Union. While an employer is not obligated to furnish information in the exact form requested as long as it is made available in a manner not so burdensome or time consuming as to impede collective bargaining, an employer may be required to furnish photocopies, particularly where the records requested are complex. *Abercrombie & Fitch Co.*, 206 NLRB 464, 466 (1973); *AT&T*, 250 NLRB 47 (1980).

The record reflects that the Reports were available for a limited time period of 30 days in the supervisor's office. Moreover, the Union stewards had a limited time to review the reports before work and they were not permitted to copy the Reports. The Reports were multi-page

spread sheets that could not be assimilated in a brief review as was the case with the one and three-page reports in *AT&T and Roadway Express, Inc.*, 275 NLRB 1107 (1985) where the Board found that permitting the Union to review the documents was sufficient. Here Respondent was under an obligation to make copes available to the Union.

Respondent next contends that the Joint Board decision absolved it of an obligation to furnish the Reports. Article 4 of the parties' collective bargaining agreement limits the Union's contractual right to information to pending grievances. However this does not diminish the Union's right to relevant information that is necessary to police the contract under Board law. *Reiss Viking*, 312 NLRB 622, 625 (1993). This is because Article 4 does not constitute a waiver of the Union's statutory rights since there is no clear and unmistakable waiver of the Union's statutory rights. *Hearst Corp.*, 113 NLRB 1067 (1955); *Skyway Luggage Co.*, 117 NLRB 681 (1957). In addition the Board will not defer to arbitration under *Collyer* in information request cases. *Lithographers Local One-L (Metropolitan Lithographers of America)*, 352 NLRB 906, n. 2 (2008). Thus, the absence of a pending grievance is irrelevant to the Union's right to information in the context of grievance investigations. *Audio Engineering*, 302 NLRB 942, 944 (1991).

Finally Respondent contends that its confidential interests preclude divulging the Report to the Union. An employer may have a valid basis for asserting confidentiality as a basis for denying an information request. *Detroit Edison Co., v. NLRB*, 440 U.S. 301 (1979); *Allen Storage and Moving Co.*, 342 NLRB 501 (2004). However the party asserting the privilege has the burden of proof and must assert the privilege in a timely manner at the time the request is made with an effort to bargain in good faith to accommodate the confidential interest. *US Postal Service*, 289 NLRB 942, 944 (1988); *Allegheny Power*, 339 NLRB 585, 589 (2003); *Pennsylvania Power*, supra; *GTE*, 324 NLRB 424, 427(1997).

Here Respondent's actions belie its contention that the Reports represent confidential information that must be protected. The Reports have been made available to the Union in conjunction with grievances in the past without regard to their confidentiality. The manner in which Respondent both disseminates the Reports to its employees and disposes of the Reports is haphazard and demonstrates no intent by Respondent to maintain their confidentiality. Further at the time the Reports were requested by the Union, Respondent did not assert the privilege and made no effort to accommodate its confidential interest. Indeed, Respondent's supervisors, without any effort to bargain, simply refused to provide the Reports despite the Union's effort to accommodate Respondent.

I conclude that Respondent has violated Section 8(a)(5) of the Act in refusing to provide the Union with copies of the Report.

Conclusions of Law

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. Respondent has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act by refusing to provide the Union with information.

4. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Remedy

Counsel for the General Counsel contends that as part of the Remedy, Respondent should be required to send information via DIAD to its employees advising them that there is a Notice to Employees citing, *Nordstrom, Inc.*, 347 NLRB No. 28 fn. 5 (2006). In *Nordstrom Inc.* the Board declined to require electronic posting in the absence of a record demonstrating that the Respondent customarily communicates with its employees electronically. However, the Board noted it was open to modifying standard notice posting language where the General Counsel provides evidence at an unfair labor practice hearing that a Respondent customarily communicates with its employees electronically and proposes such modification to the administrative law judge in the unfair labor practice proceeding.

Here General Counsel both offered evidence concerning Respondent's electronic communication with its employees and proposed modifying the standard notice posting language in the instant proceeding to include electronic notice posting.

The evidence concerning Respondent's use of its electronic DIADs reflects that it regularly communicates with its employees via the DIADs to advise them to take breaks, to warn them of hazardous road conditions and tell them of missed packages. It appears that the DIADs are capable of displaying four to five lines of text on their 3 by 5 inch screens. Given Respondent's customary communication with its employees via the electronic DIAD and given the DIAD's capacity for short text messages, it seems appropriate in this case to recommend modifying standard Board notice posting language to include communicating with its employees via DIAD that a Notice to Employees had been posted and in what locations.

Having found that the Respondents violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices addressing the violations found.

ORDER

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.[10]

The Respondent United Parcel Service, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

a. Refusing to bargain in good faith with Teamsters Local No. 886 as the collective bargaining agent of the employees in the following unit:

[10] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

All full time and regular part time feeder drivers, package drivers, sorters, loaders, unloaders, porters, office clerical, clerks, mechanics, maintenance personnel (building maintenance), car washers, United Parcel Service employees in the employers' air operation, and to the extent allowed by law, employees in the export and import operations performing load and unload duties, and other employees of the employer for whom a signatory Local Union is or may become the bargaining representative.

b. Refusing to provide the Union with requested information.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designated to effectuate the policies of the Act:

a. Upon request meet and bargain at reasonable times and places with Teamsters Local No. 886, as the exclusive collective bargaining representative of the employees in the above mentioned unit.

b. Upon request provide the Union with copies of the Daily Package Recap Report.

c. Within 14 days after service by the Region, post at its 901 S. Portland, Oklahoma City, Oklahoma facility copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Respondent shall further notify its employees in the above bargaining unit, via DIAD, that a "Notice to Employees" has been posted at its 901 S. Portland, Oklahoma City, Oklahoma facility. In the event Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since June 2008.

d. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 4, 2009

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John J. McCarrick
Administrative Law Judge

[11] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT refuse to bargain in good faith with Teamsters Local No. 886 as the collective bargaining agent of the employees in the following unit:

All full time and regular part time feeder drivers, package drivers, sorters, loaders, unloaders, porters, office clerical, clerks, mechanics, maintenance personnel (building maintenance), car washers, United Parcel Service employees in the employers' air operation, and to the extent allowed by law, employees in the export and import operations performing load and unload duties, and other employees of the employer for whom a signatory Local Union is or may become the bargaining representative.

WE WILL NOT refuse to furnish information requested by the Union that is relevant and necessary to the Union's performance of its duties as your collective bargaining representative.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed to you by Section 7 of the National Labor Relations Act.

WE WILL notify employees in the above bargaining unit, via DIAD, that a "Notice to Employees" has been posted at the 901 S. Portland, Oklahoma City, Oklahoma facility.

UNITED PARCEL SERVICE, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

8600 Farley Street, Suite 100

Overland Park, Kansas 66212-4677

Hours: 8:15 a.m. to 4:45 p.m.

913-967-3000.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 913-967-3005.